United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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74-2194

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

In The Matter of

ARBOR HOMES, INC.,
Bankrupt.

ALLAN RUBIN HOMES, INC., ALLAN RUBIN HOMES MILFORD, INC., and ALLAN RUBIN HOMES CLINTON, INC.
Claimants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
for the DISTRICT OF CONNECTICUT

BRIEF OF TRUSTEE-APPELLEE
WITH APPENDIX

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On the Brief:
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STATEMENT OF THE ISSUES

Was the District Court correct in confirming the order of the Bankruptcy Court that there is no legal basis for any award of damages to the claimant which would be credited to or set off against its stipulated indebtedness to the Trustee in the amount of $250,000.00? In particular, was the District Court correct in confirming the order of the Bankruptcy Court

a) That there was no anticipatory breach of the Agreement by Arbor prior to August 16, 1971;

b) That filing a petition under the provisions of Chapter XI of the Bankruptcy Act was not a breach of the Agreement;

c) That the filing under Chapter XI was not an assignment of the Agreement by operation of law; and

d) That compliance with the arbitration provisions of the Agreement was a condition precedent to any right of Rubin to recover damages for the breach thereof.

STATEMENT OF THE CASE

The Appellants are three corporations entirely owned by one stockholder (Allan Rubin) which were contractor distributors of homes manufactured by Arbor Homes Inc. The Appellee is Trustee in Bankruptcy for Arbor Homes, Inc. and two corporations wholly owned by it.

Business dealings between the Rubin and Arbor corporations were governed by a contract entered into between them on November 10, 1962. On August 16, 1971, Arbor filed a petition under Chapter XI and was designated debtor-in-possession. Thereafter, the Rubin corporations collectively asserted a breach of the

November 10, 1962 contract by Arbor, and claimed damages therefrom. Arbor counterclaimed, asserting an account receivable on its books against the Rubin corporations and also asserting a breach of the contract by the Rubin corporations and claiming damages therefrom. In their answer to the counterclaim, the Rubin corporations asserted their right to credits against the account receivable for goods that were either undelivered or defective.

As to breach of contract, the claimant asserted that acts of Arbor either just before or at the time of filing the petition, amounted to an anticipatory breach of the contract. The claimant further asserted that the specific provisions in the contract for arbitration, as a condition precedent to any termination of the contract, either had been waived by the parties or did not apply to the factual situation that had occurred. Arbor denied any breach of the contract on its part, and asserted that, after August 16, 1971, the claimant itself had breached several specific provisions of the contract and that the provisions for arbitration, which had been invoked by Arbor, did apply.

Hearings commenced on these issues, which were narrowed by stipulation between the parties on April 12, 1972 wherein the claimant released the debtor-in-possession from any obligation to the claimant greater in amount than any account receivable found by the court to be due from the claimant to the debtor-in-possession, and the debtor-in-possession agreed to a maximum of $397,000.00 due on said account receivable and released the claimant from any claim for damages other than said account receivable.

Thereafter, on May 2, 1972, the debtor-in-possession was adjudicated a bankrupt, and was succeeded as a party to this action by the Trustee in Bankruptcy, the present appellee. The parties then stipulated that the

net account receivable due from the claimant to the bankrupt, after allowing credits to the claimant, is $250,000.00; the parties further stipulated, with the approval of the court, that the court would decide whether there was a breach of the contract by the claimant or by the bankrupt and, if by the former, judgment would enter for the bankrupt for $250,000.00, but if by the latter, there would be further hearings to determine what, if any, damages had been incurred by the claimant which would then be a credit for the claimant against the $250,000.00 due the bankrupt.

The court then found that there had been a breach of the contract on the part of the claimant and not on the part of the bankrupt, and entered judgment in favor of the bankrupt in the amount of $250,000.00, with interest from August 16, 1971. On the claimant's motion for review by the District Court, the foregoing judgment of the bankruptcy court was confirmed.

(Although Allan Rubin Homes, Inc. was incorporated after the contract of November 10, 1962 was executed by the other Rubin corporations, all parties dealt with each other as though Allan Rubin Homes, Inc. were a signatory to the contract, the claim filed by the claimant asserted the contract right of this corporation along with the others, and in this action the parties agreed that this corporation would be treated as a signatory to the contract).

The relevant facts are as follows:*

The Rubin corporations were contractor-distributors of homes manufactured by Arbor Homes, Inc. (App. A, p. 4a; M/O p. 1). They had done business with

* (Abbreviations used: Transcript = T.; Appellant's Appendix = App. A; Appellee's Appendix = App. B; Memorandum and Order of Bankruptcy Court = M/O; Exhibit = Exh.).

each other since 1953. (App. A, p. 5a; M/O p. 3). A dispute involving a trademark arose between them, and on November 10, 1962, they entered into a written agreement (debtor's exhibit A), which thereafter governed their relationship. (App. A, p. 6a; M/O pp. 3, 4). The contract, which provided for the disposition of contested trademark rights in the event of termination, contained a precise arbitration procedure which had to be pursued as a condition precedent to termination of the contract by either party. (App. A, p. 6a; M/O p. 7).

From 1963 on, shortages in materials to be delivered, claimed violations as to the quality of the work delivered, and problems as to delivery time schedules were treated by the parties as normal incidents of a business relationship and were always resolved by conferences between them. (App. A, p. 8a; M/O p. 5). In 1971, Arbor Homes experienced financial problems, and the shortages became more severe. (App. A. pp. 8a, 12a; M/O p. 5). Nevertheless, Arbor continued to deliver houses to Rubin until immediately prior to the filing of the petition. (App. A, p. 8a; M/O p.5). From July 1, 1971 to August 9, 1971, Arbor shipped twenty-five houses to Rubin, and the total number of houses shipped to Rubin from January 1, 1971 to August 9, 1971 was one hundred forty-five which compares to one hundred thirty-two shipped in all of 1970 and one hundred forty shipped in all of 1969. (T. 4/11/72, pp. 55-56; T. 4/25/72, pp. 73-74). In July 1971, when Arbor needed less than $100,000.00 per week with which to purchase materials required for scheduled production, Rubin owed Arbor more than $475,000.00 on account, and even after giving full credits to all of the offsets claimed by Rubin, there was $250,000.00 due from Rubin to Arbor. (T. 7/19/72, pp. 23, 34; Cred. Ex. 11, p. 11; App. A, p. 8a; M/O p. 5).

The inability of Arbor to collect any part of this asset had its obvious impact on the business which was short of capital. (App. A, p. 8a; M/O p. 5). It became

delinquent in payment of its federal taxes and creditors were beginning to close in. (App. A, p. 8a; M/O, p. 5). On May 20, 1971, counsel for Rubin wrote to Arbor relative to claimed breaches, invoking paragraph 12 of the contract. (App. A, p. 9a; App. B, p. 2b; M/O p. 6). Within fifteen days, on June 4, 1971, in accordance with paragraph 12b of the contract, Arbor wrote to cure the claimed violation, and Rubin did not thereafter invoke the next step of the arbitration procedure. (App. B, p. 3b; App. A, p. 19a; M/O p. 14).

Paul Posin was the owner of Arbor Homes, Inc. and the only person who determined policy. (App. A. p. 13a; M/O p.8). Early in August, 1971, he issued an internal memorandum to his employees directing that no houses be shipped to Rubin unless he personally cleared the shipment. (Creditors Exhibit 11, pp. 9-11). The scheduling of delivery of homes to Rubin was delayed for two reasons: (1) Arbor felt that Rubin was unfairly withholding payments on account of its obligation of $250,000.00, and (2) because of its shortage of capital, Arbor found it necessary to sell its products for cash, which was available from another dealer. (App. A, pp. 8-9; M/O p. 8).

Rubin knew that production policy at Arbor was set by Paul Posin. (T. 4/7/72, p. 29). On August 10, 1971, Bak, an employee of Arbor told Rubin by telephone that he had instructions not to authorize deliveries to Rubin. (T. 4/7/72, p. 32). Rubin did not check Bak's statement with Paul Posin, or take any other action with respect to that statement. (T. 4/7/72, pp. 29-30; T. 4/11/72, pp. 28-30). On August 13, 1971, Rubin received from Mucci, another employee of Arbor, a communication that houses listed in Rubin's letter to him were not scheduled for delivery. (Debtor's Exh. D). Rubin did not check Mucci's statement with Paul Posin or take any other action with respect to that statement. (App. B, pp. 7b, 8b; T. 4/7/72, p. 29; T. 4/11/72, p. 31).

The letters written by counsel for Rubin on August 12, 13 and 16, 1971, with reference to the contract between the parties, make no mention of the communications received from Bak and Mucci on August 10 and August 13, 1971. (Creditor's Exh. #7). On August 16, 1971, counsel for Rubin wrote another letter to Arbor which is recited in full in Appellant's appendix, pages 9a-11a. It asserts a repudiation of the contract by Arbor Homes, not on the ground of a received communication, but instead on the ground of the claimed inability of Arbor Homes to deliver houses and on the legal effect of the filing of the petition.

At the moment of filing with petition under Chapter XI, the contract between the parties was still controlling their relationship. (App. A, p. 14a; M/O p. 9). There is no evidence that Arbor desired to terminate its contract with Rubin, its prime customer for many years, or that, on August 16, 1971, Arbor intended to discontinue its relationship with Rubin. (App. A, pp. 8a, 13a; M/O p. 8). There is also no evidence that on August 16, 1971, Arbor intended not to continue its operation, and after filing, the debtor continued in possession and carried on the business for a period of several months until May 1, 1972, when it was adjudicated. (App. A, p. 13a; M/O p. 8).

Several months after the filing of the petition under Chapter XI, Arbor learned of violations by Rubin of restrictive covenants set forth in the contract, and proceeded to invoke the arbitration procedure. (App. A, p. 20a; M/O p. 14). There was no waiver of the requirements of arbitration as set forth in the contract, and so far as Arbor was concerned, it considered the arbitration clause an essential part of the contract. (App. A, p. 20a; M/O p. 14).

ARGUMENT

I. THERE WAS NO BREACH OF CONTRACT ON THE PART OF ARBOR HOMES

On page 4 of its brief, Rubin asserts a breach of contract by Arbor by way of "inability to perform", coupled with a repudiation. This argument flounders on the fact, found by the trier, that after the petition was filed the debtor continued in possession and carried on the business for several months. The statement in Rubin's brief that "the plant itself closed down" is misleading in that the shutdown was only for ten days, after which the plant resumed operations (T., 4/25/72, pp. 100, 101-102).

Further, the assertion that "inability to perform" was adequately and properly communicated to Rubin is **not** supported by Rubin's references to the record, or by any other evidence.

Although Rubin appears to have discarded its earlier argument of anticipatory breach of contract on the part of Arbor, this is not entirely clear. The Connecticut rule is stated in **Wonalancet Co. v. Banfield**, 116 Conn. 582; 165 Atl. 785, (cited by Rubin), as follows:

> "A breach of an executory contract by anticipation, occurs only when there is a distinct, unequivocal and absolute refusal to perform. The renunciation must be so distinct that its purpose is manifest, and so absolute that the intention to no longer abide by the terms of the contract is beyond question."
>
> **Wonalancet Co. v. Banfield**, supra, (Conn.) p. 586

It would seem that the stern requirements of this rule are necessary to the stability of contract

relationships. Otherwise, a party desiring to avoid a contract could readily assert an act by the other party as an intention to repudiate sufficient to excuse its own non-performance

It is apparent that Rubin has attempted to use the unauthorized communications from the two employees of Arbor in just this way, by reconstruction of those events long after its own unilateral termination of the contract on other grounds. There isn't a shred of evidence that Rubin treated or even regarded the communications as a renunciation of the contract by Arbor until after Rubin's own termination of the contract.

The communications (Debtor's Exhibit D, T. 4/7/72, p. 32) at most indicate nothing more than a temporary policy not to deliver or schedule production. On their face, they are not a "distinct, unequivocal and absolute refusal to perform". There are no words of finality, or indicating a future course of action. A declaration which merely discloses the probability of a future breach cannot be treated as a present breach or confer a present right of action. 17 Am Jur 2d 913, Contracts, section 449.

That Rubin did not regard the communications, when received, as an indication that Arbor intended to discontinue its performance under the contract is perceived from the following:

(a) No attempt to verify with the head of Arbor, Paul Posin. (T. 4/7/72, pp. 29-30; T. 4/11/72, pp. 28-31; App. B, pp. 8b, 9b)

(b) No attempt to determine the impact of renunciation on Rubin's own operations. (App. B, pp. 9b, 10b).

(c) Ordering a house after receiving the first of the communications. (App. B, pp. 14b, 15b)

(d) Failure to treat the communications as a renunciation in contemporaneous correspondence. (Creditors Exh. 7).

(e) Failure to assert the communications as a renunciation in Rubin's letter of August 16, 1971 terminating the contract. (Creditors Exh. 8).

There is no evidence of any motive on the part of Arbor to effect a permanent severance of its relationship with a good customer for its products. The court found that the head of Arbor issued instructions to control deliveries to Rubin, which owed Arbor a considerable sum of money, in the hope of prompting payment from Rubin and also to give preference to customers who were paying cash for deliveries. (App. A, pp. 8-9; M/O p. 9).

It should be noted that, if the communications did create uncertainty as to future performance by Arbor, Rubin was entitled by statute to demand written assurance of continued deliveries, meanwhile suspending its performance. Sec. 42a-2-609 (1), Connecticut General Statutes.

The court was correct in finding that there was no breach of contract on the part of Arbor Homes.

The reference by Rubin to suit brought by Arbor, after the filing of the petition, is inappropriate. The purpose of that suit was to compel the payment by Rubin of its account to Arbor. Arbor wanted money, not the termination of the contract. Subsequently, when Rubin was known to be purchasing all of its houses elsewhere, Arbor did invoke the arbitration procedure. (Debtor's Exh. B and C).

d. There is nothing in the general restraining order of the court (Creditors Exh. 10) which acted as a bar to Rubin against invoking the arbitration provisions of paragraph 12 of the contract. The order restrained "actions" against the debtor. Submission to arbitrators under a contract provision is not an action contemplated by the order. In **Waterbury Blank Book Mfg. Co. v. Hurlburt**, 73 Conn. 715; 49 Atl. 196, cited by Rubin, an arbitration procedure under a rule of court, which required the award to be accepted by the court in order to be binding, was held to be an action within the meaning of the statute on appeals. The ground of the decision was that the parties had submitted themselves to the jurisdiction of the court.

CONCLUSION

The ruling on petition for review should be affirmed.

Respectfully submitted

Fred B. Rosnick
Its Attorney

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